Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 74-712

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JACK BALLAN
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Philip L. Bornstein
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Admission Pending

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Respondent Philip L. Bornstein, by and through Counsel Jack Ballan, Esq., herewith files his Petition in Opposition.

JURISDICTION

Respondent Philip L. Bornstein disputes the claim of the United States of America that jurisdiction is invoked properly under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Respondent Philip L. Bornstein accepts the two questions as presented by Petitioner United States of America.

STATEMENT

Respondent Philip L. Bornstein generally accepts Petitioner's statement, with the following changes and additions.

Respondent made three separate shipments to the prime contractor. (Petitioner's App. A, p. 3a) Respondent had no knowledge of 35 shipments made by Model to the Government.

The United States did not suffer any significant financial loss, following the settlement from Model. (Petitioner's App. C, p. 35a)

Respondent asks the Supreme Court to affirm the Circuit Court on both questions. Clearly, there is no conflict among the Circuit Courts on the second question. With respect to the first question, the alleged different constructions of the multiple forfeiture sections of the False Claims Act simply do

not exist upon careful examination. If, as the Court below stated, the "statute ... cries out for congressional attention," this attempt to seek a writ of certiorari offers no solution to the problem.

Most significantly, it is unclear which section of the Act the United States claims was violated 35 times.

REASONS TO DENY THE WRIT

A. MULTIPLE FORFEITURES

1. The decision of the Court below is totally consistent with the leading, and uncontradicted Supreme Court determination on the question of multiple forfeitures, namely, United States ex rel. Marcus vs. Hess, 317 U.S. 537.

United States vs. Ueber, 299 F 2d 310, is not in conflict with the decision below. We must examine the facts of each case. In Ueber, the defendant actually submitted 422 invoices. These clearly come within the statutory prohibitions of false claims. In the instant appeal, the defendant did not submit more than three invoices.(Petitioner's

App. C, p. 25a) There were, indeed, 35 false markings, but these were never considered "false claims" by either of the lower Courts. There was no basis whatsoever to find additional "false claims."

Further, nowhere is it made clear under which of the three sections of the Act, the United States is proceeding. This ambiguity makes it improper to contend there is any conflict between the Court below and any other co-equal court.

The basic thrust of Ueber is consistent with the approach below, which was based on an equitable and reasonable interpretation of the False Claims Act. It is noteworthy that in Ueber the 422 invoices were reduced to 54 vouchers. If the arguments of the United States herein are valid, then Ueber should have had 422 forfeitures - an obviously unreasonable approach. As the Circuit Court below said, its view attempted a "reasonable construction" which focused "... upon conduct of the defendant

rather than upon the fortuity of the number of invoices submitted by the main contractor." (Petitioner's App. A, pp. 16a and 17a). This is perfectly consistent with the Ueber rationale and general statutory construction.

The undersigned has read almost all the cases pertaining to multiple forfeitures. For example, see Toepelman v. United States, 263 F. 2d 697 (C.A. 4) Not one - including Ueber - attached liability to the number of acts of the defendant, beyond those actually committed by him.

Nor is it correct, as the Government claims, that the decision of the court below "...substantially defeats..." the statutory objectives. As Justice Black stated in Hess, the Act's purpose was "...to make sure that the government would be made completely whole." Hess, supra, 317 U. S., at page 551; 63 S. Ct., at page 388. The court below accomplished this goal, as did the courts in both Rohleder and Ueber. In this basic respect these

decisions are, therefore, completely consistent.

B. DOUBLE DAMAGES

The courts below correctly charged only nominal double damages to defendants. The case of United States v. Klein, 230 F. Supp. 426, aff'd per curiam, 356 F 2d 983 (3d Cir. 1966), is uncontradicted by any other Circuit Court decision. The United States quotes no law contra. The Klein formula in no way "nullifies" the double-damage provision of the False Claims Act. One needs only to pose the hypothetical situation where complete restitution is not made, as it was in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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of New Jersey
For defendant, Philip L.Bornstein
Admission Pending

January 3, 1975